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27547-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH R. BUDIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE KENNETH H. KATO

BRIEF OF RESPONDENT

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For the purposes of this appeal, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

A. THERE WAS AMPLE EVIDENCE FROM WHICH THE JURY COULD FIND THE ELEMENTS OF THE CRIME.

The defendant claims there was insufficient evidence presented to support the conviction for the crime of rendering criminal assistance.

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not gainsay the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

The relevant part of RCW 9A.76.070 reads:

> (1) A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.

RCW 9A.76.070.

The definition of "rendering criminal assistance" is found in RCW 9A.76.050:

> As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he:
>
> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or
>
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
>
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person....

RCW 9A.76.050.

Far from lacking information, the State presented nearly insurmountable evidence that the defendant "...if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime...." What else could the defendant have intended when he lied to the police? It is impossible that the defendant did not know that the person who shot

Adama Walton had committed a murder. As it later developed, the testimony at trial showed the defendant knew who was present at the time of the shooting. Yet, the defendant claimed to police that he did not see who was present. There is no other logical conclusion except that the defendant intended to "prevent, hinder or delay" the apprehension of the shooter.

Another part of the definition reads: "(1) Harbors or conceals such person..." RCW 9A.76.050(1). Again, the State's case is "open and shut" on this issue. The defendant certainly concealed the identity of several people, including the shooter.

The defendant's arguments are not in harmony with the record. The defendant claims that police did not rely on his statements. This is rather fine parsing of the testimony. The testimony was that the police sought the shooter, the defendant refused to reveal the names of persons involved, thus requiring the police to continue to search. It is an untenable defense argument that the police did not rely on the defendant's false statements. The public was left in the position of having a murderer running lose when the defendant could have short-circuited the process by identifying the correct parties. His lack of memory was clearly relied upon by the police.

The central problem with the majority of the defendant's supporting cases in support of his arguments is that the cases are inapposite. The cases cited by the defendant are fact patterns in which a defendant refused to supply information to the police that might have incriminated the defendant. That is not at all the situation in this case. In the first place, the defendant was not a suspect or under arrest at the time he was asked questions by the police. Secondly, the information sought by the police would not have incriminated the defendant. The defendant was simply a witness.

For example, the case of *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637 (1979), cited by the defendant, was a situation in which a putative defendant refused to give his identification to police. It was in the context of obtaining identification that the Court held that there was insufficient reason to conduct what amounts to a search. *Id.* at 52. Most importantly, the defendant in *Brown* was being asked for identification that would be used to incriminate *Brown*. *Brown* has little or nothing to do with the case at bar. The defendant in this case was not being asked to incriminate himself.

In *State v. Barwick*, 66 Wn. App. 706, 833 P.2d 421(1992), the defendant tried to conceal the contents of his wallet from a police officer. Not only is *Barwick* not directly on point as he was trying to protect

himself, the *Barwick* case was abrogated by this court in *State v. Cole*, 73 Wn. App. 844, 871 P.2d 656 (1994).

In *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428 (1977), the issue was whether a person could obscure the slogan pre-printed on the state's license plates. This case has nothing to do with refusing to display a state slogan.

It is staggering that anyone would diminish the nature of the defendant's actions in this case to the phrase, the "...mere" making of a false statement does not constitute preventing or obstructing the apprehension or discovery of a felon. It is unknown how the defendant can argue that lying to the police and hiding the identity of a vicious killer is "mere" or that police would not rely upon the defendant's lies. The police were (and are) hindered in the capture of a killer who remained loose in the public because of the defendant's refusal to simply give the shooter's name to police.

Clearly the defendant knew exactly who was present on the sidewalk and the shooter's identity. The truth tumbled from witnesses' mouths during testimony and only added the final nails to what was already an overwhelming case, just based on the logic. It is a great stretch to try to convince the jurors that the defendant did not see who was on the

sidewalk and the defendant did not see who fired two bullets into his legs and a fusillade into the body of Adama Walton.

B. THE DEFENDANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant claims he was provided ineffective assistance of counsel because his counsel did not request an instruction on "duress."

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999).

> To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And to show prejudice, "`[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

This case is essentially resolved by the decision in *State v. Mannering,* 150 Wn.2d 277, 75 P.3d 961 (2003). In that case, the Court held that not pursuing a "duress" defense was a strategic decision on the part of defense counsel. *Id.* at 287. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

RCW 9A.16.060 defines duress as:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) That such apprehension was reasonable upon the part of the actor; and
>
> (c) That the actor would not have participated in the crime except for the duress involved.
>
> (2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.
>
> (3) The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.

> (4) The defense of duress is not established solely by a showing that a married person acted on the command of his or her spouse.

RCW 9A.16.060.

Interestingly, the defendant claims that there was evidence he was fearful and cites to Det. Hollenbeck's testimony that the defendant was fearful. What the defendant does not mention is that all of Det. Hollenbeck's testimony on this topic was objected to by defense counsel and those objections were sustained. Thus, there is nothing in the record at RP 156 to support the defendant's arguments.

The defendant next seeks support from Det. Hollenbeck's testimony that when gangs are involved in shootings, "...it is not unusual...that people fear retaliation." This statement says nothing about whether *this* defendant was fearful. This also raises the point that the defendant would have to prove to the jury that the defendant did not intentionally or recklessly place himself in a situation in which it is probable that he would be subject to duress. It is not hard to recognize that riding around with Adama Walton and being a gang member in general would put a person in a situation where he might be subject to duress. This would have been another hurdle for defense counsel to overcome.

Det. Hollenbeck testified, "There was a lot of fear in that culture in that community of people...." This statement does not support any sort of argument that this defendant was in fear of imminent harm. The officer related only that the defendant had been shot and was fearful for his family. RP 132.

Of great interest is the fact that the defendant said nothing whatever, during his testimony, pertaining to lying to the police because he was afraid of retaliation. The defendant did not testify that he was in fear of retaliation at the times he lied to police. The defendant did not testify that he was in fear of retaliation to family members and that was the reason he lied to police.

So, defense counsel could have pursued a "duress" defense, with essentially no supporting data except that the detective had noted fear in gang members before and the minimal data from Officer Haney of the Spokane County Police Department. Ofc. Haney had no first hand information, he was told on the radio that the defendant had been shot and the defendant thought the shooter might come to his mother's house. RP 132. Ofc. Haney informed the defendant's mother of that information and they left the house. RP 133.

The defense counsel would have been presented with the awkward situation of the defendant simply maintaining the same falsehoods at trial

that he told to officers or trying a duress defense with almost no support and the need for the defendant to convince the jury that the reason he lied was because he was in fear of retaliation. Yet, there was nothing in the record indicating that anyone threatened him with immediate harm or death.

It was an "either/or" decision on the part of defense counsel. Either the defense went with the defense they used, or they could have completely eviscerated the original defense by having the defendant testify in a way that would openly tell the jury that the defendant had lied to police and why. There would be no way to successfully use both defenses at the same time.

In addition to the destruction of the first "I did not see anything" defense, adding a duress defense would have required the defendant to testify in a manner so that 12 non-gang member jurors would understand the reasonableness of the fear (emphasizing the defendant's gang connections), how and why his fear caused him to lie to the police, how the defendant decided that he or another person came to be in fear of immediate death or grievous bodily harm, etc. The defendant could not make a strong showing of the danger from gangs without weakening his defense because the defendant put himself in that position.

It is not the State's burden to disprove a duress defense. It is the defendant's task to prove duress beyond a reasonable doubt. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). Based on the scant material to work with, defense counsel made a tactical choice not to include a duress defense. This would be a tactical decision and therefore not a basis for an ineffective assistance of counsel argument.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 30th day of July, 2009.

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